In the

BRITISH COLUMBIA & VICTORIA TUG & TRANSP. COMPANY, LTD.,

Petitioner,

vs.

A. W. MYRBOLL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF.

CHARLES H. FARRELL,
JAMES H. KANE,
W. B. STRATTON,

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710 L. C. Smith Building,
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In the Supreme Court of the United States

OCTOBER TERM, 1920

No. .....

BRITISH COLUMBIA MILLS TUG & BARGE COMPANY, LTD., a Corporation,

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The petition of British Columbia Mills Tug & Barge Company, Ltd., a corporation, respectfully shows to this Honorable Court:

I.

Shortly prior to March 22, 1917, Petitioner, the owner of the Tug "Commodore", and Respondent,

Mylroie, entered into a written contract, (Rec. p. 66), as follows:

"MEMORANDUM OF AGREEMENT made the 14th day of March in the year of our Lord One Thousand Nine Hundred and Seventeen between the B. C. MILLS TUG & BARGE CO. LIMITED whose registered office is situated in the City of Vancouver in the Province of British Columbia (hereinafter called "the Tug Company") of the one part, and ANCHORAGE SUPPLY CO. of Seattle, Washington, and Anchorage, Alaska, (hereinafter called "the Charterers") of the other part.

WITNESSETH:

1. That the Tug Company agree to tow during the spring, summer and autumn of the year 1917 the barge "Bangor" on a succession of round trips between the Western Boundary Line of United States Waters, and Anchorage, Alaska, for the sum of $4,500.00 for each such round trip, the said Barge to be loaded on the North bound trip and light on the South bound or return trip.

2. The Tug Company will employ their tug "Commodore" in said service barring accident to hull and/or machinery, Government requisition, or other causes beyond the control of the said Tug Company.

3. That the Tug will render to the said Barge "Bangor" reasonable assistance from time to time in any emergency which might arise, and whilst discharging at Anchorage the Tug is to be within call of the Barge at all

times to render such reasonable assistance in case of any emergency which might arise. *The Tug Company is not to be held liable for any damage which might happen to the said Barge "Bangor" or its cargo while in tow or at anchor.*

4. A round trip is to be considered completed on return of said Barge "Bangor" at Western Boundary Line of United States Waters off the Southern entrance to Plumper Sound, and the said sum of net $4,500.00 shall be paid by the Charterers to the Tug Company on completion of each round trip and before another is commenced.

5. The Tug Company shall allow the Charterers eight lay days, Sundays included, on each round trip, the said eight lay days to include all waiting time at Seattle and Anchorage, Alaska. Any waiting for a longer period than eight days to be paid for by the Charterers at the rate of $100.00 per day or pro rata for any period less than a day.

6. This agreement shall be in effect on or about the first day of April, 1917, till on or about the first day of November, 1917, the Charterers to give ten days' notice if tug is required earlier than the first day of April, 1917. If the Charterers shall not take the said tug by the tenth day of April, 1917, the Tug Company shall be at liberty on giving twenty-four hours' notice of their intention so to do to cancel this agreement and shall thereupon be at liberty to seek other employment for the said tug.

7. The Charterers shall give satisfactory guarantees as to payment upon delivery of the said barge in manner above mentioned.

8. That if during the life of this agreement any salvage services are performed, then after payment of the expense in connection therewith the balance shall be divided share and share alike between Owners and Charterers.

IN WITNESS WHEREOF these presents have been executed by the parties hereto the day and year first above written.

THE COMMON SEAL of B. C. Tug & Barge Co. Limited was affixed hereto in the presence of:
"E. W. Hamber,"
Director,
"J. A. Hendry,"
Secretary.
THE COMMON SEAL of the Anchorage Supply Co. was affixed hereto in the presence of:
"Anchorage Supply Co."
by A. W. Mylroie."

The contract, signed by petitioner, was sent by mail from Vancouver, B. C., to respondent, who, after its receipt, signed and returned it by mail to petitioner, accompanying it with a letter, dated March 15, 1917, of which the following is a copy:

"Anchorage, Alaska, March 15, 1917.

B. C. Tug & Barge Co.,

Vancouver, B. C.

Dear Sirs:

I am just in receipt of agreements which I am signing and enclosing your copy. I notice in the rewording of this agreement that you have omitted that which you should have put in, and added some which should have been omitted, but I am a good gambler and have signed as written. However, I think that I am entitled to a letter from you confirming our verbal agreement, that in case of negligence on part of tug or crew, your company should be held liable for damage to barge or cargo.

Further that in case of damage to barge, which would require dry-docking or other repairs which might require several days, I should be released from paying demurrage of $100.00 per day on tug.

I feel confident of fair treatment from you, and hope you have the same confidence in me.

I am fully expecting to get away on the 20th of this month, and am using every effort to be all prepared to leave the mill on that date. Will wire you definite time before Saturday night.

Yours very truly,

A. W. MYLROIE.

P. S.

The Anchorage Supply Co. is not a corporation, therefore no seal is attached to within agreement. I have signed this as the sole owner of above company."

To this last letter the petitioner replied by letter, dated March 22nd, 1917, as follows:

March 22nd, 1917.

Anchorage Supply Co.
5502 15th N. E.
Seattle, Wash.

Dear Sirs:

We beg to acknowledge receipt of your letter of the 15th inst. with which you returned one copy of the Towing agreement dated 14th March, duly signed.

With regard to your remarks in the first paragraph of your letter, we have met you as far as we can in the contract as signed having regard to the risks we run as compared with the amount we are to receive for the service of our tug, and we must therefore rely on the contract as it stands.

With regard to the second paragraph, we consider that the 8 lay days allowed you before charging demurrage are the utmost we can afford. If the barge requires to be laid up for any longer period than 8 days, and if you do not desire to pay the $100.00 per day, then we would be at liberty to employ the tug in other services until such time as the barge may be ready. It would not be fair to us to keep the tug waiting for an indefinite period.

Trusting that you will clearly see our position in this matter, and that same will prove satisfactory to all concerned,

Yours very truly,

B. C. Mills Tug & Barge Co., Ltd.

JAH/R Secy."

Pursuant to above writings, the tug, on March 22, 1917, took in tow the respondent's barge "Bangor," with cargo aboard, for a voyage from the international boundary line between Canada and the United States, to Anchorage, Alaska, and return. The voyage proceeded until about 1:45 A. M. of March 27, 1917, at which time the shackle of the barge, being a part of its own equipment, broke, and the barge drifted onto the eastern shore of Mary Island, sustaining damage to herself and cargo.

Respondent proceeded against the tug in rem for damages, (Amended Libel, p. 10, Record; Amended Answer, p. 6, Record).

After trial, the U. S. District Court of Alaska, Robert W. Jennings, Judge, rendered an opinion in writing (Rec. p. 723), dismissing the libel, upon the merits, and decree was entered accordingly (Rec. p. 734). Respondent appealed. The Circuit Court of Appeals for the Ninth Circuit reversed the decree appealed from (Rec. p. 752), and by its decision held that the towage contract, as shown above, by the terms of which the tug or her owner were "not to be held liable for any damage which might happen to the said barge 'Bangor' or its cargo while in tow or at anchor," was not enforceable, because the tug was not allowed by law to avoid by contract the consequences of its own negligence.

The Circuit Court of Appeals, by its decision, further held that notwithstanding the contract ex-

empting the towing vessel from liability for the negligence of the master or crew, the towing vessel would still be liable for such negligence, because such a contract is contrary to public policy.

The decision of the Circuit Court of Appeals is, petitioner submits, in conflict with the decisions of this court heretofore announced in cases of a similar character, and is in conflict with the following:

Baltimore & Ohio R. R. Co. v. Voigt, 176 U. S. 498.

Robinson v. B. & O. R. R. Co., 237 U. S. 84.

Santa Fe R. R. Co. v. Grant Bros. Co., 228 U. S. 177.

Hartford Fire Ins. Co. v. Chicago R. Co., 175 U. S. 91, at 98.

The William H. Webb, 14 Wallace, 406.

The decisions of the Circuit Court of Appeals is also in conflict with the decisions of other Circuit Courts of Appeals, viz:

The Oceanica, 170 Fed. 893, (Second Circuit) which overruled the former decision of that Court in *The Edmund L. Levy,* 128 Fed. 683.

Monk v. Cornell Steamboat Co., 198 Fed. 472, (Second Circuit).

McCormick v. Shippey, 124 Fed. 48, (Second Circuit).

Kittie Ten Eyck v. Director General of Railroads and Hartman-Blanchard Co., (decided ....., 1920 ..... Fed. ....., (Second Circuit).

M. P. Doullut & Son v. General Contract Co., Inc., 221 Fed. 876 (Fifth Circuit).

The Maine & Manhattan, 170 Fed. 915, (Second Circuit).

The Fri, 154 Fed. 333 (Second Circuit) at 338.

The decision of the Circuit Court of Appeals is also in conflict with the following United States District Court decisions:

Canton Ins. Co., Ltd., et al. v. The Goliah, Neterer, Judge. Western District of Washington (within the Ninth Circuit) decided in November, 1917; decision not published, but certified copy filed in this case with the Clerk of this Court.

Kittie Ten Eyck v. Director General of Railroads, et al., ... Fed. ..... (March 27, 1920).

The Merrimac, 17 Fed. Cas. No. 9478.

McCormick v. Shippey, 119 Fed. 226.

The Maine and Manhattan, 161 Fed. 401, (District Court Southern Dist N. Y.) and cases therein cited.

The decision of the Circuit Court of Appeals is in conflict with the law as announced in:

Scrutton on Charter Parties, page 199, note K. 33 Cyc. 292.

Moore on Carriers, Vol. 1, p. 14, Sec. 12.

United Service, 8 Prob. 56, affirmed in Court of Appeals, 9 Prob. 3.

Luna v. Kingston, 36 Times Law Reports, 112, (Dec. 1919).

Angell Law of Carriers, 59.

Alexander v. Greene, 3 Hill 19.

Wells & Tucker v. The Steam Navigation Co., 2 N. Y. 204.

The tug "Commodore" was not a common carrier.

The Margaret, 94 U. S. 495.

The Oceanica, 170 Fed. at 894.

Kittie Ten Eyck, supra, ... Fed. ..... (C. C. A).

And "a contract against liability for negligence can not be construed in the case of a tug as it may be in the case of a common carrier."

The Oceanica, 170 Fed. at 894.

Baltimore & Ohio R. R. Co. v. Voigt, supra.

Robinson v. B. & O. R. R. Co., supra.

Sante Fe R. R. Co. v. Grant Bros. Co., supra.

Hartford Fire Ins. Co. v. Chicago R. Co., supra.

The William H. Webb, supra.

The "Syracuse", 12 Wall. 167, was, we submit, decided on the theory that the language of the contract did not exempt the tug from liability for negligence, or intend to do so. This is made clear by a consideration of cases from this Court last above cited. The contract in the instant case did by apt

language exempt the tug from liability for damage caused by its negligence and the Circuit Court of Appeals so decided, but held that such a contract was contrary to public policy and therefore void.

A towage contract which exempts the owner of a tug from liability for damage resulting from the tug's negligence, exempts the tug itself.

Bancroft v. Queen of the Pacific, 180 U. S. 49.

The St. Hubert, 107 Fed. 727 (C. C. A.)

The Westminster, 102 Fed. 368 (D. C.)

The Oceanica, 170 Fed. 893 (C. C. A.)

The Kensington, 94 Fed. 885.

Your petitioner submits that there is herein presented and shown a failure on the part of the Circuit Court of Appeals for the Ninth Circuit to follow and adhere to the rules of law respecting the validity of a contract exempting a tug from liability for her own negligence heretofore established by this Court, and especially as announced by this Court in the cases above cited, although said cases and many others were called to the attention of the Court in the briefs of petitioner; that there is a conflict between the Circuit Court of Appeals for the Ninth Circuit and other Circuit Courts of Appeal as shown by the decisions of such other Circuit Courts of Appeal hereinbefore cited; that there is a conflict between the various District Courts of the United States, on the same question.

See

Canton Ins. Co. v. Goliah, supra.

McCormick v. Shippey, 119 Fed. 226.

Kittie Ten Eyck case, ...Fed. .....

The Merrimac, 17 Fed. Cas. No. 9478.

The Monarch, 235 Fed. 795.

In Re Moran, 120 Fed. 556.

The Somers N. Smith, 120 Fed. 569.

The M. J. Cummings, 18 Fed. 178.

The Jonty Jenks, 54 Fed. 1021.

And petitioner submits that in order to harmonize the decisions of the Federal Courts, the Circuit Court of Appeals of the Ninth Circuit should be required to follow the same rule of law heretofore established by this Honorable Court and other Circuit Courts of Appeal.

Your petitioner presents herewith as a part of this petition a brief, showing more fully its views on the questions involved, together with a certified transcript of the entire record in the Circuit Court of Appeals, all as required by the rules of this Honorable Court.

The question here presented involves the construction of the decision of this Honorable Court in the case of the *Syracuse, supra.*

St. Louis, K. C. & C. R. R. Co. v. Wabash R. Co., 217 U. S. 247; 54 Law Ed. 752.

It is common knowledge that throughout the country, clauses exempting the owner of the tug

and the tug from liability for negligence are inserted in contracts for towage service. The tugboat interests of the country are large and the separate interests of these industries and likewise the interests of the thousands of persons dealing with them call for a definite settlement of the validity of such clauses.

II.

The second amended libel of respondent alleged that the tug "Commodore" at the inception of the towage was unseaworthy and insufficiently manned, in that she did not have a sufficient crew to maintain a legal lookout on the vessel during the voyage. This allegation petitioner denied, and the District Court found the facts in favor of petitioner.

The Circuit Court of Appeals for the Ninth Circuit decided that at the time of the loss, the tug "Commodore" did not have a proper lookout but did not decide that the tug was "not provided with a crew adequate in number and competent for their duty with reference to all the exigencies of the intended route," (The Lady Pike, 21 Wall. 1), including lookout duty. The said Court did, however, decide that because the lookout duty was improperly and negligently performed, the vessel was "to that extent unseaworthy."

Petitioner submits that even if the lookout duty was improperly and negligently performed, the vessel was not thereby rendered unseaworthy, there

being aboard the tug at the inception of, and at all times during the voyage, as the evidence abundantly shows, an adequate crew of competent seamen, besides one additional experienced master mariner, also a member of the crew, who performed during the entire night of the loss, the duties of lookout. If there was negligent performance of lookout duty, it was *mere negligence,* liability for which was exempted by the contract. The vessel was seaworthy, even if lookout duty was negligently performed by those charged with that duty. If there was a fault, it was one of *navigation* (*The Schooner Catherine v. Dickinson, et al.,* 17 How. 162, at 177) not amounting to unseaworthiness.

If said Court of Appeals intended to decide that the vessel was unseaworthy because insufficiently manned to afford a proper lookout, then, we submit that such decision is contrary to the weight of and not supported by the evidence, and is clearly erroneous. The full and adequate complement of officers and seamen was twelve (Record p. 209, Johnson, master). On the trip in question the tug had thirteen officers and men, the additional or extra man being Capt. Bjerre (Rec. pp. 207-209), a master mariner for 28 years (Rec. p. 228), who had worked on the sea since he was sixteen years of age on all kinds of ships (Rec. p. 18) and who between the years 1914 and March, 1917, either as master on a tug, towing barges, or as pilot and assistant to the master, had made 20 or 25 round trips through the very channel where the accident occurred (Rec.

p. 229) and who was accustomed to act as lookout (Rec. p. 257). The qualifications of Captain Bjerre to act as lookout cannot be questioned. He was signed on the tug as purser but was acting as pilot (Rec. p. 231). On the trip in question (Rec. pp. 208-209). On the night of the stranding (which occurred at about 1:45 A. M.) he was acting as lookout from 11:30 P. M. until the tug anchored after seven o'clock the following morning)Rec. pp. 231, 232, 257, 317) and was in the pilot house continuously during that time) Rec. pp. 231, 257, 317).

Likewise, we submit that the decision of said Circuit Court of Appeals, holding there was negligent or improper performance of lookout duties, is contrary to and not supported by the evidence, and clearly erroneous.

Petitioner further submits that even if the tug were unseaworthy by reason of inadequacy of lookout, and damage resulted thereby to respondent, no recovery may be had for such damage because the contract exempted the tug therefrom. The contract (paragraph 3) provides: "The Tug Company is not to be held liable for any damage which may happen to said barge 'Bangor' or its cargo while in tow or at anchor."

III.

It was also decided by the Circuit Court of Appeals (contrary to the facts found by the District Court) that the tug was guilty of negligence in

causing the loss, viz., in putting the helm hard over, without warning the tow. Petitioner submits that this finding is, and all findings of negligence of the tug are, contrary to the weight of and not supported by the evidence, and clearly erroneous; and even were there such neglect, it is exempted by the contract.

It was also decided by the Circuit Court of Appeals (contrary to the finding of the District Court) that the barge "Bangor" was seaworthy in that her own shackle, (which broke, causing the loss), was not defective. Petitioner submits that this finding is contrary to and is not supported by the evidence, and clearly erroneous.

All of said questions were duly raised and argued by your petitioner in said District Court and in said Circuit Court of Appeals.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals, and all exhibits in this case, which was entitled in that Court: "A. W. Mylroie, Appellant, vs. British Columbia Mills Tug & Barge Company, a corporation, Appellee, No. 3448," to the end that said cause may be reviewed and determined by this Court as

provided by law, and that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate; and that the said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court.

BRITISH COLUMBIA MILLS TUG & BARGE COMPANY, LTD.,

By W. B. Stratton,
Proctor and Counsel for Petitioner.

United States of America, District of Washington, County of King.—ss.

W. B. Stratton, being first duly sworn, on oath says: That he is Proctor and Counsel for Columbia Mills Tug & Barge Company, Ltd., the Petitioner above named, and as such he has authority to make this verification; that no officer of the petitioner is present or available to make this affidavit; that he has read the foregoing petition, knows the contents thereof and that the facts stated therein are true, to the best of his knowledge, information and belief.

W. B. STRATTON.

Subscribed and sworn to before me this 10th day of December, 1920.

E. C. MORGAN.

Notary Public in and for the State of Washington, residing at Seattle.

NOTARIAL SEAL.

I hereby CERTIFY that I have examined the foregoing Petition, know the contents thereof, and in my opinion the same is well founded, and that the case is one in which the prayer of the Petitioner should be granted by this Court.

W. B. STRATTON.
Of Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

BRITISH COLUMBIA MILLS, TUG & BARGE COMPANY, a Corporation,
Petitioner,
vs.
A. W. MYLROIE,
Respondent.
No.

BRIEF OF PETITIONER.

In accordance with the rule of this Court only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ, have been set forth in the foregoing petition; and upon this application, at this time, the evidence supporting the findings of the District Court in favor of petitioner will not be referred to at length, because, as we understand the rules, it is not permissible, at this stage of the proceeding to do so. Suffice it to say that if afforded an opportunity the petitioner believes it will be able to show that the findings of the Circuit Court of Appeals were clearly erroneous, and that the decree of the District Court should have been affirmed.

I.

The towage contract, set forth in the petition, exempting the owner of the tug from responsibility for damage resulting from the tug's negligence, is valid.

Robinson v. B. & O. R. R. Co., 237 U. S. 84.

Santa Fe R. R. Co. v. Grant Bros. Co., 228 U. S. 117.

Baltimore & Ohio R. R. Co. v. Voigt, 176 U S. 498.

Hartford Fire Ins. Co. v. Chicago R. Co., 175 U. S. 91 at 98.

The William H. Webb, 14 Wallace 406.

The Oceanica, 170 Fed. 893 (Second Circuit).

The Maine and Manhattan, 170 Fed. 915 (Second Circuit).

Monks v. Cornell Steamboat Co., 198 Fed. 472 (Second Circuit).

M. P. Doulutt & Son v. G. G. Co., 221 Fed. 876, 880 (Fifth Circuit).

McCormick v. Shippy, 119 Fed. 226 (D. Court) 124 Fed. 48, (Fifth Circuit).

Canton Ins. Co. Ltd. et al. v. The Goliah, Dist. Court, Western Dist. of Washington, No. 4264 in Admiralty, decided Nov. 1917. (Certified copy of opinion herewith).

Alexander v. Greene, 3 Hill. 19.

Scrutton on Charter Parties, page 199, Note K.

36 Cyc. 292.

Moore on Carriers, 2nd Ed. Vol. 1, p. 14, and cases cited in Note 46.

Kitie Ten Eyck v. Director General (Second Circuit, year 1920).

Same case, District Court. decided March 27, 1920. 267 Fed (No. 6 Am. Sheets) 974.

The Maine, 161 Fed. 401.

The Merrimac, 17 Fed. Cases No. 9478.

United Service, 8 Prob. 56, affirmed in Court of Appeals, 9 Prob. 3.

Luna v. Kingston, 36 Times Law Reports 112 (Dec. 1919).

In *Wells & Tucker v. Steam Navigation Co.,* 2 N. Y. 204, Bronson, J. for the Court, said, on page 208:

> "It is clear that those who tow boats and vessels are not common carriers of the things towed. As we are all agreed in this opinion, and the point has been adjudged (*Canton v. Rumney,* 13 Wend. 387, and *Alexander v. Greene,* 3 Hill 9). I will not discuss the question more at large. * * * They may make just such stipulations as they please concerning the risk to be incurred. They may say, we will answer for nothing but a loss happening through our own fraud or want of good faith. In short, the parties stand on equal terms, and can in this matter, as they may in others, make just such a bargain as they think will answer their purposes. There is, I believe, no authority to the contrary, and on this question, as well as the other, we are all agreed."

And the tug owner was held exempt.

In *Alexander v. Greene,* 3 Hill. 9, the New York Appellate Court, in an opinion by Bronson, Judge, more fully discussed the character of a tug boat, its liability for loss, etc., and similarly ruled that such boats are not common carriers and are perfectly free to stipulate thereon as they please, and against liability for loss by reason of their own negligence.

In the *Kittie Ten Eyck,* an admiralty case (C. C. C. A.) *supra,* the Court say:

> "In *B. & O. R. R. Co. v. Voigt,* 176 U. S. 498, the Court held that an express messenger in an express car by contract, could exonerate the railroad company from liability to him and that such contract did not contravene public policy. This was held because it was said that the railroad company did not assume toward him the obligations of a common carrier as it would to a passenger because he was not a passenger; that as to him it assumes the obligations of a private carrier, and that a private carrier is free to contract as to the conditions of the carriers and no reason of public policy forbids such carrier from stipulating against its own negligence and making it a part of the contract.
>
> To the same effect are the cases of *Robinson v. B. & O. R. R. Co.,* 237 U. S. 84, and *Santa Fe R. R. Co. v. Grant Bros. Co.,* 228 U. S. 177."

There is no question of public policy involved in the private contract between petitioner and respondent, as in the case of a common carrier. It is well settled that the parties in such a case have the right

to provide against liability for negligence.

Hartford Fire Ins. Co. v. Chicago etc. R. R. Co., 175 U. S. 91, 99.
Kittie Ten Eyck, (C. C. A.) *supra.*

In *McCormick v. Shippey,* 124 Fed. 48, it was held in the Second Circuit that it is competent for a charterer of a vessel not a common carrier to stipulate in the charter party against his liability for loss or damage to the vessel through his negligence, there being no question of public policy involved, as in the case of common carrier. This case was cited with approval by this Court in the case of *Santa Fe R. R. Co. v. Grant Bros. Co.,* 228 U. S. 177; and in the *Santa Fe* case this Court, after recognizing the rule that a common carrier, when acting as such, may not enter into a contract exempting itself from liability for negligence, said:

> "Manifestly this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relations: those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service."

This case reviews the authorities on the question involved in the instant case and we submit is controlling; that, under it, the contract in question exempted petitioner and its tug from responsibility

for negligence, and is valid. To same effect is the later case from this court, *Robinson v. B. & O. R. R. Co., supra.*

The Oceanica, 170 Fed. 893, Second Circuit, decided May 19, 1909, and followed by subsequent cases in that court, is a leading case; it overruled the former decision of that court as announced in *The Edmund L. Levy,* 128 Fed. 683. It holds that a towage contract, by which the tow assumes all risks, releases the tug from liability for her own negligence, resulting in injury to the tow; and that such contract exempting the owner also exempts the vessel. It reviews prior decisions, including the *Syracuse,* 12 Wall. 167.

It may be claimed that the decision in *The Oceanica* was based on the theory that in New York, even a common carrier may by contract exempt itself from responsibility for its own neglect. The Circuit Court of Appeals evidently were of that impression; but the opinion in the Oceanica distinguishes between tugs and common carriers, and shows that a tug exemption contract is not contrary to public policy as defined by the Courts of the United States

Even if the public policy of New York permitted a carrier to exempt itself from responsibility for negligence, effect would not be given by Courts of the United States to such exemption contract.

The Kensington, 183 U. S. 263, 46 L. Ed. 190. Same case, 94 Fed. 885 (Second Circuit, New York).

II.

The Tug Commodore was not a common carrier.

The Margaret, 94 U. S. 495.

The Oceanica, 170 Fed. at 984.

Kittie Ten Eyck, supra, ... Fed. ..... (1920 Second Circuit).

Also cases *supra.*

III.

A contract against liability for negligence cannot be construed in the case of a tug as it may be in the case of a common carrier.

The Oceanica, 170 Fed. at 894.

Baltimore & O. R. R. Co. v. Voigt, 176 U. S. 498.

Robinson v. B. & O. R. R. Co., 237 U. S. 84.

Santa Fe R. R. Co. v. Grant Bros. Co., 228 U. S. 177.

Hartford Fire Ins. Co. v. Chicago R. R. Co., 175 U. S. 91.

Also other cases cited in subdivision I *supra.*

IV.

That there is a conflict among the District Courts of the United States as to the validity of a contract exempting a tug and her owner from responsibility

for her own negligence. See:

Canton Insurance Co. v. Goliah, (certified copy opinion filed herewith).

McCormick v. Shippey, 119 Fed. 226.

M. P. Doullut & Son v. G. C. Co., 221 Fed. 876.

Kittie Ten Eyck v. Director General, (Dist. Court N. Y., March 27, 1920).

The Merrimac, 17 Fed. Cas. No. 9478.

The Monarch, 235 Fed. 795.

In re Moran, 120 Fed. 569.

The M. J. Cummings, 18 Fed. 178.

The Jonty Jenks, 54 Fed. 1021.

The decree of the Circuit Court of Appeals for the Ninth Circuit (Rec. p. 765) reversed the decree of the District Court and remanded it "with leave to the respective parties to introduce further evidence on the question of damages."

To all intents and purposes the decree of the Circuit Court of Appeals was a final decree. At least, we take it that this Court will not deny the writ of certiorari upon the ground that the sole question of the amount of damages is left open to be determined by the District Court.

Geo. A. Fuller Co. v. Otis Elevator Co., 245 U. S. 489, 62 L. Ed. 422.

Harriman v. Northern Securities Co., 197 U. S. 244, 49 L. Ed. 739, 25 S. Ct. 493.

Cole v. Ralph, 64 L. Ed., Advance Sheets, p. 374. (decided March 15, 1920).

Denver v. New York Trust Co., 57 L. Ed. 1101, 229 U. S. 123.

Spiller v. Railway Co., 64 L. Ed. Advance Sheets, page 533 (decided May 17, 1920).

It would work a great hardship upon petitioner to require it to introduce further evidence, in Alaska, on the question of damages, and then after the final decree had been entered in the District Court, to appeal to the Circuit Court of Appeals, all at great expense and delay, and, after the decree on such appeal had been entered, to apply for the writ. If petitioner's contention as to the effect of the contract, be sustained, the question of damages will be eliminated; if not sustained, the amount of damages may then be determined.

If the application for the writ shall be denied on the ground that no final decree has been entered in the Circuit Court of Appeals, or because the application is prematurely made, the petitioner respectfully requests that the ground of denial be stated by the Court in order that petitioner may be advised as to further proceedings and further application for writ of certiorari.

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